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Back-up Book for SIG(I) Meeting

19 April 1984

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NSDD-84: Federal Personnel Security Review

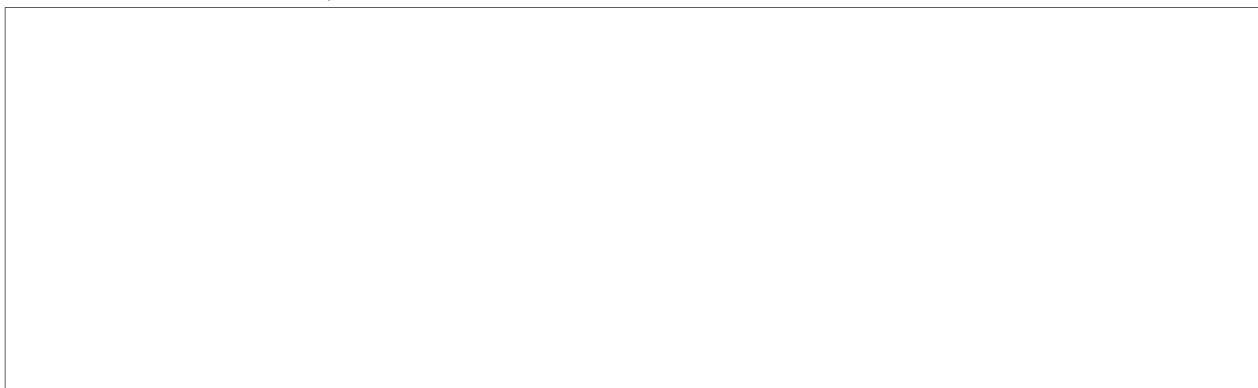
TAB D



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TAB E

The Options Paper Prepared by the Personnel Security Review
Group



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U.S. Department of Justice

Office of Intelligence Policy and Review

Washington, D.C. 20530

January 13, 1984

General Counsel

84-215

MEMORANDUM FOR GENERAL RICHARD G. STILWELL
Interagency Group/Countermeasures Chairman

Re: NSDD-84 Personnel Security Review

Attached, for your consideration and comment by the IG/CM at its next meeting, is an options paper prepared by the Personnel Security Review group established by the Attorney General pursuant to NSDD-84. This paper describes the fundamental issues that the group has identified in the course of its discussions and on which further SIG(I)/NSC guidance is required before the review may proceed. After the IG/CM review, we intend to send the paper forward to the SIG(I) and then to the NSC, with a recommendation that the Director of OPM be afforded an opportunity to participate in the discussions at that level. We will also provide a simultaneous copy to the Director of CMB for a determination as to whether and which other departments and agencies outside the national security structure should receive copies for comment.

MARY C. LAWTON

Counsel for Intelligence Policy
Office of Intelligence Policy and Review

Attachment.

cc: The Attorney General
Director of OPM
Working Group Members



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U.S. Department of Justice

Office of Intelligence Policy and Review

Washington, D.C. 20530

(TO BE SENT TO NSC AFTER IG/OM-SIG(I) REVIEW.)

MEMORANDUM FOR ROBERT C. MCFARLANE
Assistant to the President for
National Security Affairs

Re: NSDD-84 Study of Federal Personnel
Security Program

The National Security Decision Directive on Safeguarding National Security Information (NSDD-84) required that the Attorney General, in consultation with the Office of Personnel Management, establish a group to study the federal personnel security program and recommend appropriate revisions in existing Executive Orders, regulations and guidelines. After consultation with OPM, the Department of Justice convened a group consisting of representatives of the Office of Personnel Management, Department of Defense, Department of Energy, Department of Treasury, and the Federal Bureau of Investigation. Although a few additional agencies, including CIA, were advised of the progress of the group and provided recommendations to the group, other affected agencies were not invited to participate in this initial stage because of our belief that more could be accomplished by a smaller group that would identify principal areas for further examination and solicit a broader range of comments at a later date.

CIA NOT
A MEMBER
OF THE
GROUP!

Preliminary meetings have identified several fundamental policy issues relating to the Government's personnel security program. The guidance of the National Security Council is required on these issues at this time in order for the group to proceed in an expeditious and efficient manner. Once we have received direction on these fundamental questions, the study group will begin drafting proposals that will implement these decisions and identify more specific issues.

As a preliminary matter, it must be noted that NSDD-84 was issued in the Intelligence Community context. However, any changes in the federal personnel security program will affect many agencies in the Executive Branch that are not part of that

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Community. Thus, a threshold issue concerns whether the authority for making these fundamental policy decisions should be the Intelligence Community and the National Security Council structure -- the Senior Interagency Group (Intelligence) and its Interagency Group/Countermeasures -- which participated in the development of NSDD-84 or the Office of Management and Budget, which traditionally coordinates policy proposals that have Executive Branch-wide scope. We have elected to forward this options paper through the NSC/SIG(I) system because of the origins of the NSDD but have recognized the broader interests involved by providing a simultaneous copy to OMB for dissemination as it sees fit. Furthermore, we recommend that, in view of OPM's joint responsibility for review of the personnel security program under paragraph 6 of NSDD-84 and its central role under Executive Order 10450 for personnel security among civilian employees, the Director of OPM be invited to participate at an appropriate point in the NSC's consideration of these issues.

ISSUE I. - Scope of Study

Should the group established under NSDD-84 focus its efforts on security standards for (a) access to classified information, (b) employment in sensitive positions generally, or (c) suitability for employment generally, including a general requirement of loyalty to the United States?

The relevant statutes and Executive orders distinguish, but in an uneven way, between suitability for federal employment and access to classified information. Suitability for federal employment is determined by reviewing an individual's competence and ability to perform both generally and in a particular position based upon criteria such as education, experience, training, supervisory potential, reliability, integrity, character, and ability to work with others. On the other hand, access to national security information depends upon a determination that an individual will protect classified information from unauthorized disclosure based upon many of the same suitability standards, but with a heavier emphasis on criteria such as loyalty to the United States, trustworthiness, discretion and potential for compromise or entrapment.

Obviously, there may be considerable overlap in the nature of the information that is used to make these two determinations. Heavy and repeated drug use, for example, is a suitability indicator since it may prevent a person from functioning properly on the job, but it is also a security concern since it may indicate a lack of respect for authority or potential for compromise or entrapment. This overlap is particularly acute with regard to "sensitive" positions that do not involve access to classified information but involve other responsibilities, such as fiduciary, health or public safety matters, that offer the potent

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Under 5 U.S.C. 3301 and E.O. 10577, (as amended by E.O. 12107) OPM is given responsibility for establishing standards for general suitability for federal employment. Under E.O. 10450, Federal departments or agencies are required to ensure that all persons employed by them are "reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States." To this end, each agency is responsible for establishing programs to "ensure that the employment and retention in employment of any civilian officer or employee . . . is clearly consistent with the interests of national security."

Executive Order 12356, "National Security Information," like its predecessors, requires that each agency determine the "trustworthiness" of persons given access to classified information. However, the DCI has authority to establish special access programs for information pertaining to intelligence activities.

Policy, judicial and bureaucratic developments over three decades have raised a serious question of whether the reference to "national security" in E.O. 10450 means to include only positions requiring:

- access to classified information;

or is intended to also include positions that involve

- proximity to classified information, with or without actual access; and
- sensitive (law enforcement, medical, fiduciary) or other functions unrelated to such access.

It is against this backdrop of confusion and uncertainty that NSDD-84 mandated a study of the "federal personnel security program," a term that, in its most commonly understood sense, springs from Executive Order 10450. Thus, a threshold question as to the scope of the NSDD-84 effort is whether this group should address only civilian access to classified information, all access to classified information (including contractors and military), occupancy of any sensitive position, or loyalty of all Government employees regardless of position or access.

Agency Positions

All entities represented on the working group agree that the group should limit its deliberations as much as possible to positions involving access or proximity to classified information, including contractors and military personnel.

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The Treasury Department does not object to this approach so long as the ability of Federal agencies to designate certain positions as sensitive without regard to the occupant's access to classified information is not affected.

RECOMMENDATION

The NSDD-84 personnel security study group should focus on the standards, procedures and authorities relating to access or proximity to classified information by all Government employees, contractors and military personnel and address the federal employment suitability program, including sensitive positions with no access to classified information, only insofar as necessary to ensure that a clear and consistent distinction is maintained between the two areas.

Approved

Disapproved

ISSUE II. - Relation to E.O. 10450

Should Executive Order 10450, "Security Requirements for Government Employees", be replaced, revised or supplemented?

If, as recommended, the group is authorized to focus on access to classified information, the question then becomes how such an effort should relate to E.O. 10450 which establishes general security requirements for federal employment. Executive Order 10450 was promulgated on April 27, 1953. It established a federal employment screening program based upon certain security requirements, including loyalty to the United States. E.O. 10450 requires that federal civilian employee appointments be based upon a background investigation, the scope and intensity of which varies with the extent to which the position offers the occupant the opportunity to have an adverse effect on the "national security". "Security" considerations such as access to classified information continued to be an important factor in the screening process. However, the fundamental purpose of the Order was to deny federal employment to persons who did not meet its requirements regardless of whether the positions for which they were being considered required access to classified information or were considered sensitive for other reasons.

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Judicial decisions over the years have narrowed the meaning of the term "national security," as used in E.O. 10450, to include only positions directly concerned with protection from internal subversion and foreign aggression. At the same time, the Executive branch attempted to refine the screening process generally by dividing sensitive positions into those that are "critical-sensitive" and those that are "noncritical sensitive." In addition to their traditional national security applications, these terms include a broad range of positions that require a high degree of trust, such as fiduciary or policymaking functions, and that may not necessarily involve access to classified information. As noted earlier, these evolutionary developments have served to blur and confuse the precise meaning and scope of the term "national security" in E.O. 10450.

The system for protecting classified information requires that access be limited to federal employees who have a demonstrated "need to know" and have been determined to be trustworthy. This system is a subset of the general requirements for employment in sensitive national security-related positions as established by E.O. 10450. However, because of the ambiguities inherent in E.O. 10450 and the term "national security," the personnel security program established by that order and intended to eliminate disloyal individuals from Government employment has come to be confused with personnel security programs intended to deny access to classified information to federal employees who have not been determined to be trustworthy and have no official need to know. Another inadequacy in E.O. 10450 is the fact that military personnel, who may require access to very sensitive classified information, are not mentioned in or governed by that Order.

Agency Positions

The members of the group agreed that E.O. 10450 should not be significantly altered insofar as it relates to generalized requirements for federal employment. On the other hand, the standards, considerations and processes for granting access to classified information as a part of that employment should be clarified and made uniform throughout the Government. This may be accomplished by a new Executive Order dealing solely with personnel security programs for federal employees, contractors and military personnel who require access to national security information. This course of action is consistent with the jurisdiction conferred on this group by NSDD-84 and also recognizes that access to classified information is a significant question addressed independently of federal employment.

Because of the potential for judicial and public controversy that would further weaken the program, OPM has strong reservations about changing E.O. 10450. OPM believes that the desired

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changes in this area could be accomplished by Presidential directive supplementing E.O. 10450 without risk to existing statutory or judicial authority. However, OPM defers to the general consensus, provided that only essential changes are made in E.O. 10450.

RECOMMENDATION

That the federal personnel security study group draft a new Executive Order concerning access or proximity to classified information by all persons, modifying E.O. 10450 only insofar as necessary to make clear that this determination is distinguishable from the general requirements of E.O. 10450.

Approved

Disapproved

ISSUE III. - Investigative Standards Under A New Order

Should there be a basic prescribed level of coverage and scope in background investigations for all persons requiring access to the same types of classified information?

Investigative standards and practices differ among agencies, depending upon the status of the person being investigated and the nature of the information to which the person requires official access. For example, military and contractor personnel are not included under E.O. 10450, and there is a completely different set of criteria for access to Sensitive Compartmented Information as compared to access to Top Secret or Secret information.

Logically, all classes of persons, whether civilian, military or contractor, should meet the same basic investigative standards since they all are seeking access to the same national security information. In addition, the most rational basis for drawing distinctions between investigations for access to various categories of information is the sensitivity of that information as described in the E.O. 12356 classification system. That Executive Order provides for three levels of classification, Top Secret, Secret and Confidential, depending upon the gravity of the potential damage to the national security that might result from the information's unauthorized disclosure. That order also provides authority for establishing special access programs for especially sensitive classified data, such as Sensitive Compartmented Information.

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The creation of basic investigative standards that are related to the sensitivity of the information to which access will be granted raises three problems. First, some agencies have been compelled in the past to reduce the scope and coverage of background investigations in order to minimize delay and budgetary strains caused by large numbers of investigations. Adoption of uniform basic investigative standards could eliminate this flexibility. Second, care must be exercised to ensure that the investigative programs of the more stringent agencies are not diluted with standards reflecting the lowest common denominator acceptable to all other agencies. Third, any basic standard must ensure that the resulting investigations will support both suitability and security determinations in order to avoid, as much as possible, duplicative expenditure of resources.

Further, the implementation of relatively uniform, basic investigative standards may require reassessment and realignment of investigative responsibilities and authorities in the future. This question will be addressed by the group as this process continues, and recommendations will be presented at a later date.

Agency Positions

The group agrees that an attempt should be made to develop reasonable uniform basic investigative standards that will preserve a fair degree of flexibility above the basic requirements, avoid unreasonable resource burdens, and strengthen the weaker security programs while preserving those that are strong already.

RECOMMENDATION

That the NSDD-84 federal personnel security study group develop uniform basic investigative standards for access to national security information that reflect workable and appropriate distinctions between the various categories of such information.

Approved

Disapproved

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ISSUE IV. - Adjudicative Standards
Under A New Order

Should uniform basic procedural and due process standards be included for all access denials and revocations?

The practical effect on an individual of a clearance denial or revocation can differ significantly depending on the circumstances of that person's federal employment. For example, in some cases a denial or revocation can mean loss of employment or transfer to a less desirable position. Even where a denial does not have such drastic results, promotion potential could be affected. In these cases, the potential severity of a denial or revocation of access argues for a greater degree of procedural due process than might otherwise be established.

With a few exceptions, such as the Central Intelligence Agency, agencies must incorporate certain due process and appeal procedures into their adjudications for access to classified information in order to protect federal employees and to survive judicial scrutiny. Currently, except for fundamental requirements such as notice, each agency is more or less free to establish its own procedures.

As a result of Supreme Court decisions, there exists, pursuant to Executive Order 10865, an elaborate system of due process for industrial contractor personnel. Other systems of due process flow from the sensitivity of the information itself (See, for example, DCID 1/14 concerning SCI access).

The benefits of developing uniform procedures include simplicity and assurance that all persons will of necessity be treated in a similar manner regardless of their position or employing agency. Further, applying reasonable adjudication and appeal standards across the board increases significantly the extent to which government decisions in this area will be sustained in litigation and determined not to be arbitrary and capricious. Due process and procedural protections of some variety are required by the courts and need not remove or reduce the ultimate flexibility of the decisionmaker in determining whether access is in the best interests of the Government.

Agency Positions

The group agrees that uniform, basic due process standards for access adjudications should be developed that would preserve necessary agency flexibility but ensure fair and reasonable treatment for individuals.

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RECOMMENDATION

That the NSDD-84 study group be authorized to develop basic uniform adjudicative procedures for denying or revoking access to classified information that are related to the impact an unfavorable determination may have on the person's status.

Approved

Disapproved

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With this guidance in hand, the group will proceed to develop more specific provisions and identify the more specific issues that will require your further consideration.



MARY C. LAWTON

Counsel for Intelligence Policy
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